

## **Fee Waiver Request**

### **Records Pertaining to EPA Enforcement Review: National Archives IIP, NPDES Permit No. MD0065871, National Archives and Records Administration (NARA), Permittee**

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(A)(iii), and EPA's implementing regulations, 40 C.F.R. § 2.107(1), the Environmental Integrity Project (EIP) requests that all charges (e.g., search, review, and duplication fees) incurred in connection with this request be waived. The legislative history of FOIA indicates that the fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005) (internal quotations and citations omitted). EIP is a national nonprofit organization dedicated to the integrity and enforcement of our environmental laws. EIP's work combines research, reporting, and media outreach to spotlight illegal pollution and encourage federal and state agencies to take enforcement action to stop the practices leading to such pollution.

As discussed below, EIP satisfies the two-prong test for a fee waiver established in FOIA and outlined in EPA's implementing regulations because: (i) "disclosure of the information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of government," and (ii) disclosure of the information "is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1).

#### **I. Disclosure of the Requested Information is in the Public Interest Because It Will Contribute Significantly to Public Understanding of the Operations or Activities of the Government**

EIP qualifies for the fee waiver because the requested information will "contribute significantly to the public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1), (2).

##### **A. The Subject of the Request Concerns the Operations and Activities of the Government**

EIP seeks EPA's records related to the National Archives II facility (NPDES Permit No. MD0065871) due to the Facility's failure to retain the required monitoring records, failure to sample the required permit parameters, and violations of the Permit effluent limitations that have placed the Facility in significant noncompliance. The Maryland Department of Environment referred the Facility to EPA because of these ongoing violations of the Facility's NPDES Permit. Given that this review, and EPA's documentation of its review, is central to EPA's role as regulator, investigator, gatherer of information, and enforcer under the Clean Water Act (CWA), we believe that these records necessarily involve the operations and activities of the government.

This important review clearly concerns EPA's "operations and activities." 40 C.F.R. § 2.107(l)(2)(ii).

**B. The Disclosure is Likely to Contribute Significantly to the Public Understanding of the Government's Operations or Activities**

The guiding test to determine whether or not the disclosure of the requested information will contribute significantly to public understanding of the government's operations or activities is "whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject." *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994). After reviewing the information provided, EIP intends to use its resources and expertise to inform and educate other nonprofit advocacy organizations and the public as to the evolving regulation of facilities discharging effluents into the Chesapeake Bay watershed under the Clean Water Act.

**II. Obtaining the Information is of No Commercial Interest to EIP**

The second element of the fee waiver analysis concerns the requester's "commercial interest" in the information requested. There are two relevant inquiries to determine whether the information requested is "primarily in the commercial interest of the requester" and a fee waiver is appropriate if either inquiry is satisfied. 40 C.F.R. § 2.107(l)(3). The first inquiry is whether the requester has a "commercial interest that would be furthered by disclosure." 40 C.F.R. § 2.107(l)(3)(i). Here, as a 501(c)(3) nonprofit organization, EIP has no commercial, trade, or profit interest in the material requested. EIP will not be paid for or receive other commercial benefits from the publication or dissemination of the information requested.

The second inquiry concerns the requester's primary interest in the disclosure. *See* 40 C.F.R. § 2.107(l)(3)(ii). The requested materials will allow for a more thorough analysis of EPA's investigations, the emissions from the monitored site, and any need for greater monitoring, regulation, or enforcement. Even assuming *arguendo* that EIP does have a commercial interest in the requested materials, a complete fee waiver would be appropriate under this second inquiry because EIP's primary interest in the materials is non-commercial, i.e., to inform the public about the operations and activities of the government. Therefore, the "disclosure of the information . . . is not primarily in the commercial interest of" EIP, and a fee waiver is warranted. 5 U.S.C. § 552(a)(4)(A)(iii).

**Conclusion**

In light of the foregoing, the requested records bear directly on identifiable operations and activities of EPA, will contribute significantly to a broad public understanding of important matters relating to government functioning and compliance with federal laws, and will not serve any commercial interest on the part of EIP. Therefore, a fee waiver is appropriate.